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IN THE

Supreme Court of the United States

October Term, 1962

NO. 344

BROOKLYN UNION GAS COMPANY
CONSOLIDATED EDISON OF NEW YORK, INC.
ELIZABETHTOWN CONSOLIDATED GAS COMPANY
LONG ISLAND LIGHTING COMPANY
PHILADELPHIA ELECTRIC COMPANY
PUBLIC SERVICE ELECTRIC & GAS COMPANY
SOUTH JERSEY GAS COMPANY
PIEDMONT NATURAL GAS CO.
THE UNITED GAS IMPROVEMENT COMPANY
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
DELAWARE POWER & LIGHT CO.;

Petitioners

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit

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Brooklyn Union Gas Company, et al., Petitioners, were appellants in No. 18943 in the court below. This was a

companion case to Nos. 18941, 18942, and 18944. A single record was used for all four cases, and all were decided by a single opinion. Socony Mobil Oil Company, Inc., appellants in No. 18941, and Marathon Oil Company (formerly The Ohio Oil Company), appellants in No. 18942, have filed petitions for writs of certiorari in their respective cases, in both of which Petitioners were appellees. Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case, *the writ to issue only in the event that this Court should grant the petition for writ of certiorari filed by Socony Mobil Oil Company, Inc. or Marathon Oil Company*, because Petitioners have been awarded judgment against them, and Petitioners' cause of action against Transcontinental Gas Pipe Line Corporation needed be considered only in the event that there is a possibility of reversal of that judgment.

Citation to Opinions Below

The opinion of the District Court of June 29, 1960, (R. 651-665, App. A, pp. 1-12), is reported at 201 F. Supp. 673. The opinion of the District Court of November 23, 1960, (R. 754-764, App. A pp. 13-21), is reported at 201 F. Supp. 679. The opinion of the Court of Appeals (R. 834-842, App. A, pp. 22-29), is reported at 299 F. 2d 692.

Jurisdiction

The judgment of the Court of Appeals was entered on February 14, 1962 (R. 845, App. A, p. 30). Rehearing was denied on May 21, 1962. (R. 908). The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

A natural gas pipe line company was purchasing gas from independent producers at the time of the promulgation of Federal Power Commission Order No. 174-A. The independent producers obtained a stay of Order No. 174-A and increased the price of natural gas without filing with the Commission as required by the Order. The pipe line company filed with the Commission an application to increase its prices in order to pass on to its customers the price increases collected by the independent producers during the pendency of the stay orders. The Commission entered an order approving a settlement of the pipe line company's rate proceedings which allowed the rate increases and provided that the pipe line company would pass on to its customers any refunds the independent producers were required to make to the pipe line company. After the dissolution of the stay orders, the pipe line company made no effort to collect refunds, so its customers filed suit against it and the independent producers for refund of the overcharges resulting from the collection of increased rates by the independent producers without filing with the Commission. Judgment was rendered in favor of the customers against the independent producers, and neither the trial court nor the court of appeals considered the independent cause of action of the customers against the pipe line company for the amount of such overcharges. This conditional petition for a writ of certiorari presents the following questions:

1. Whether the pipe line company was under an obligation to exercise reasonable diligence to secure for the benefit of its customers the refunds for overcharges for natural gas due the pipe line company from the independent producers.

2. Whether the pipe line company is liable to its customers for the amount of such overcharges regardless of whether the pipe line company has collected or may now collect from the independent producers, and even though the pipe line company might not have secured refunds had it diligently pursued its remedies.

Statutes and Regulations Involved

The statutory provision involved is Section 4 of the Natural Gas Act, 52 Stat. 821, 822, 15 U.S.C., Sec. 717c.

The regulation involved is Federal Power Commission Order No. 174-A, 19 F.R. 5081.

The administrative order involved is the order of the Federal Power Commission of November 7, 1955, in Docket Nos. G-5258 and G-8487, Transcontinental Gas Pipe Line Corp., 14 FPC 1075.

The applicable portions of all of the above are set forth in Appendix B hereto, pp. 31-44.

Statement

Socony Mobil Oil Company, Inc. (hereinafter referred to as "Mobil") and Marathon Oil Company (formerly The Ohio Oil Company, hereinafter referred to as "Ohio") are "independent producers" of natural gas within the meaning of that term as defined in Federal Power Commission Order Nos. 174 and 174-A. Under separate contracts executed prior to June 7, 1954, each sold gas to Transcontinental Gas Pipe Line Corporation (hereinafter referred to as "Transco") for resale in interstate commerce. Petitioners are public utilities along the Eastern Seaboard who purchased natural gas from Transco.

Subsequent to this Court's decision on June 7, 1954, in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534, which was superseded by Order No. 174-A, 19 F.R. 5081, and under which every independent producer who engaged in the transportation or sale of natural gas on or subsequent to June 7, 1954, was required to file with the Commission copies of rate schedules setting forth all rates and charges for the transportation or sale of natural gas which were in effect on June 7, 1954. The order further provided that the rates in effect on June 7, 1954, could not be changed without first filing notice of such change pursuant to Section 4(d) of the Natural Gas Act and the further provisions of Order No. 174-A.

Mobil and Ohio each filed petitions for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, and on November 16, 1954, obtained orders staying Order No. 174-A as to Mobil and Ohio pending final hearing of the petitions for review. The Court of Appeals dismissed both petitions for lack of jurisdiction, denied petitions for rehearing, and this Court denied writs of certiorari. On February 1, 1957, the stay orders were dissolved by their own terms.

During the pendency of the stay orders, Mobil and Ohio demanded and received from Transco prices in excess of the rates in effect on June 7, 1954. These price increases were provided for in their respective contracts, but were made without any rate schedules or notices of change in rates having been filed with the Commission.

On November 26, 1954, and January 20, 1955, Transco filed rate schedules with the Commission, each providing for increases in the rates for natural gas sold by Transco.

These increases were designed, inter alia, to pass on to Petitioners and other customers of Transco the increased charges Transco was being required to pay under the contracts with Mobil and Ohio. Each Petitioner entered into an agreement with Transco for the complete settlement of Transco's rate proceedings, and on November 7, 1955, the Commission issued an order approving the proposed rate settlement, which provided in the following language that Transco would refund to its customers, including Petitioners, any refunds that Mobil and Ohio should be required to make to Transco:

> "In the event any of the suppliers of Transco whose rates are currently in effect * * *. under Court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of such refund attributable to natural gas purchased from said supplying company or companies by Transco after Transco's increased rates were permitted to become effective to cover such increased costs of gas shall be refunded to Transco's utility customers within sixty days after receipt of such refund by Transco." (14 F.P.C. 1075, 1079; App. B, pp. 41-42)

On January 10 and 12, 1959, Petitioners brought suits against Mobil, Ohio, and Transco to recover each Petitioner's proportionate part of the payments in excess of the June 7, 1954 rates made by Transco to Mobil and Ohio prior to their filing rate schedules and notices of changes of rates as required by Order No. 174-A. The jurisdiction of the district court was invoked because of diversity of citizenship. In its pleadings, Transco admitted that it had taken no affirmative action to obtain refunds from Mobil and Ohio, but alleged that it was under no obligation to

do so. Transco further alleged that Petitioners were the true owners of the claims asserted against Mobil and Ohio and that Transco claimed no right to the proceeds of any refunds from Mobil or Ohio, but was a mere conduit under a duty to account to Petitioners for the full amount of any such funds which might come into its hands. Transco took no position with respect to the merits of the claims for refunds.

In the trial court, each of the parties filed motions for summary judgment. The trial court's memorandum opinion of June 29, 1960, recognized the Petitioners' position as assignees of Transco's cause of action and as the real parties in interest. The Court further held that Petitioners were entitled to recover from Mobil and Ohio on the merits of the controversy, because the only lawful rates from June 7, 1954, until Mobil and Ohio received approval of different rates from the Federal Power Commission were the contract rates in effect June 7, 1954. In view of this holding, the Court did not reach the question of whether Petitioners stated an independent claim against Transco, saying: "Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order." (R, 665, App. A, p. 12).

The trial court entered judgment that Mobil and Ohio refund the overcharges to Petitioners and that Petitioners take nothing from Transco. Mobil and Ohio appealed from this judgment, and Petitioners were, therefore, required to do likewise in order to preserve their cause of action against Transco and to prevent the take-nothing judgment from becoming final.

The Court of Appeals affirmed the judgment of the trial court, including the failure to reach the question of Petitioners' claim against Transco.

Reasons for Granting the Writ

1. There is no reason for considering this petition unless a writ is granted upon the application of Mobil or Ohio, as previously stated, because Petitioners are entirely satisfied with the result of the judgments below.

2. If the petition for a writ of certiorari filed by Mobil or Ohio should be granted, it is absolutely necessary that this conditional petition also be granted. Otherwise the Petitioners would be subject to a final judgment that they take nothing from Transco without any court's ever having considered the merits of their cause of action, and would thus be deprived of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

3. Transco promised to pay Petitioners any money collected from Mobil or Ohio. It is well settled that where there is a promise to pay out of a fund to be realized in a certain way, the promisor is under an implied obligation to use reasonable diligence in performing the act upon which the payment is contingent. 17 *C.J.S., Contracts*, Sec. 468, p. 969. And when the promisor fails to take the steps necessary to obtain performance of the condition precedent, he cannot be heard to say that had he taken such steps the condition would not have been performed, but is liable for payment as though the condition had been performed. *Empire Gas & Fuel Co. v. Pendar*, 244 S.W. 184 (Tex. Civ. App. 1922, *error dismissed*). Under the settlement agreement approved by the Commission, Transco

was under a duty to require Mobil and Ohio to make refunds. Transco admittedly made no effort to secure such refunds, and accordingly is liable to Petitioners for the full amount of such refunds even though Transco might not have been able to secure such refunds had it diligently pursued its remedies. Petitioners do not seek a double recovery, but Petitioners are clearly entitled to judgment independently against Transco, regardless of whether Mobil or Ohio is liable to Petitioners or to Transco.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted if the petition of Mobil or Ohio is granted.

Respectfully submitted,

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APPENDIX A
Trial Court's Memorandum Opinion
June 29, 1960

These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermilion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a "favored nations" clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, comingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m.c.f., while Ohio's contract price on said date was 8.730376 cents per m.c.f. On June 7, 1954, the Supreme Court of the United States held in *Phillips Petroleum Co. v. Wisconsin*, 1954

347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, that Phillips, a natural gas producer and gatherer, was a "natural gas company, within the meaning of that term as defined in the Natural Gas Act, 15 U.S.C.A. Sec. 717, et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, and selling natural gas in interstate commerce. The Phillips decision is applicable to both of them. Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954, rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to

Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certification of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. *Magnolia Petroleum Company, et al. v. Federal Power Commission*, 5 Cir., 1956, 236 Fed. 2d 785.

Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commission as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and

commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

> "In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Tranco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco. . . ."

Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers. On January 10, 1959, all plaintiffs, except Delaware Power & Light Company, instituted Civil Action No. 12,474 in this court against Transco, Mobil, and Ohio. On January 12, 1959, Delaware Power & Light Company filed a similar action in the District Court of Harris County, Texas, 127th Judicial District,

under Docket No. 520,558, which cause was thereafter removed to this court by Transco as Civil Action No. 12,-482 and was later consolidated with C.A. No. 12,474. In C.A. 12,474 Plaintiffs seek a total recovery in the amount of $912,414.72, plus interest, and separately claim from Mobil and Ohio the sums of $494,626.64 and $417,788.08, respectively. In C.A. 12,482 the total amount sought is $25,378.60, plus interest, while the separate claims against Mobil and Ohio are $13,757.92 and $11,620.68, respectively.

The basis of plaintiffs' action against Mobil and Ohio is that the contract rates in effect between Transco and Mobil and Ohio on June 7, 1954, were the only lawful rates which could be charged for gas delivered by Mobil and Ohio to Transco during the period from February 1, 1955, through January 31, 1957. During this period the charges in excess of the alleged lawful rate were passed on to plaintiffs and other customers of Transco. As the real parties in interest, plaintiffs now seek restitution of what they consider to be their just portion of the excess charges. Asserting Transco's claims against Mobil and Ohio, they maintain that Transco has effectively assigned to plaintiffs' said claims in its answer, counter-claim, and cross-claim.

Against Transco plaintiffs claim any monies that it may recover from Mobil and Ohio, since the agreements and order provide for such a refund in the event any of the suppliers of Transco, whose rates were being charged under court stay orders, were required to make refunds to Transco. They contend, however, that Transco is liable to them regardless of whether it has collected from Mobil and Ohio and even though it might not have collected had it vigorously pursued its remedies. They rest Transco's said liability upon an implied obligation arising under the re-

fund provision of the settlement agreements and order to exercise reasonable diligence to secure the refunds due Transco, including the timely filing and good faith prosecution of suits, if necessary, against Mobil and Ohio. They maintain that Transco has not fulfilled this obligation by merely filing a cross-action for declaratory relief in the present action and failing to pursue vigorously its rights against Mobil and Ohio in plaintiffs' behalf.

Mobil contends that neither plaintiffs' nor Transco can recover any monies from it, since the court does not possess the legislative power of rate-making and cannot fix or determine what were the just and reasonable rates for Mobil's gas sold to Transco and cannot award reparations. It claims that the Federal Power Commission approved rates in Transco's rate proceeding designed to recover Transco's cost of service, including recoupment of charges paid Mobil by Transco, on representations that such costs, expenses, and rates which would recoup them were proper, just, and lawful as the Natural Gas Act requires. Whereby Mobil argues that plaintiffs and Transco have no right of recovery and ought to be estopped from asserting that such costs and expenses are unlawful, unjust, and unreasonable. It maintains that the Fifth Circuit's stay order fully protected Mobil from any refund. It cites various reasons why recovery by plaintiffs would be inequitable and asserts that Transco cannot recover upon its counter-claim and cross-claim for declaratory judgment.

Ohio contends that the Fifth Circuit's stay order granted it full immunity from the requirements of Order No. 174-A and of Section 4 of the Natural Gas Act and that there can be no recovery because the court of appeals did not condition the stay on the giving of any bond or any

agreement to refund. It argues that the court is not authorized to award reparations. It would show that plaintiff's claim, if any ever existed, is now barred by limitations, citing Article 5526, *Revised Civil Statutes of Texas;* which applies to debts where the indebtedness is not evidenced by a contract in writing. Ohio then sets forth the equitable considerations supporting judgment in its favor and against judgment for plaintiffs.

Transco contends that the real controversy is between plaintiffs and Mobil and Ohio and that its only obligation, in the nature of a stakeholder's or interpleader's, is to pay over and account to plaintiffs for any monies that plaintiffs may recover from Mobil and Ohio and that the court may direct be paid to Transco by Mobil and Ohio for distribution to plaintiffs. It maintains that plaintiffs have failed to state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

The court believes that the following actions should be taken on the motions for summary judgment. Plaintiffs' first motion for summary judgment against Mobil and Ohio should be granted, while their second motion against Transco should be denied. Transco's first and second motions for summary judgment should be granted. The motions for summary judgment of Mobil and Ohio should be denied.

This case can be decided on motions for summary judgment in favor of plaintiffs and Transco, since there is no genuine issue as to any material fact and since said moving parties are entitled to judgments as a matter of law. Mobil and Ohio contend that there are genuine issues of material fact, namely, whether any of the gas sold to Transco was resold to plaintiffs and, if so, what portion

reached each plaintiff and what amounts of money, if any, may be recovered by each plaintiff from Mobil and Ohio. These alleged issues are irrelevant because plaintiffs are asserting Transco's cause of action. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the amounts charged therefor. The higher rates charged by Mobil and Ohio resulted in greater charges to plaintiffs by Transco. What distribution of overpayments to Mobil and Ohio is made to Transco's customers is a matter between Transco and its customers. It is no ground upon which Mobil and Ohio can avoid repayment, if they are protected from further payment or a multiplicity of suits.

The amounts that plaintiffs seek to recover against Mobil and Ohio are shown in Exhibit "E" attached to plaintiffs' original complaints, which amounts are certified by the affidavit of J. T. Duncan, Assistant to the Financial Vice-President of Transco. All of the plaintiffs are utility customers of Transco; each was a party to the settlement agreements with Transco which were approved by the Federal Power Commission. The amounts alleged to be due to each plaintiff, as set forth in Exhibit "E", were computed in accordance with the formula stated by the Federal Power Commission in its order approving the rate settlement with Transco.

Plaintiffs are the assignees of Transco's cause of action and are the real parties in interest. Transco effectively assigned its claims against Mobil and Ohio to plaintiffs by its pleadings. See Transco's answer, counterclaim, and cross-claim, p. 8, par. (c); p. 15, par. 33; and p. 22, par. 19. All the parties to the assignment are before the court. So long as Mobil and Ohio can satisy their obligation to Transco by paying plaintiffs, which Transco freely states, any defense to the assignment which could

be asserted by Transco in a suit by plaintiffs against Transco is of no consequence to Mobil and Ohio.

Plaintiffs' claims are not barred by limitations, since neither the two-year period of Article 5526 nor the four-year period of Article 5527, *Vernon's Texas Civil Statutes*, would bar recovery. Article 5526 applies to actions for debt where the indebtedness is not evidenced by a contract in writing. Covering many actions for "money had and received", Ohio contends that said statute applies to the case at bar. Article 5527 refers to actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. Plaintiffs contend that the latter statute governs the case at bar. The controlling question, however, is the date upon which the cause of action arose. It is evident that the cause of action did not arise until the day when the stay orders were dissolved, namely, February 1, 1957. The excess rates were lawfully collected during the pendency of the stay orders. *Natural Gas Pipeline Co. of America v. Harrington*, 5 Cir., 1957, 246 Fed. 2d 915. Since these actions were filed on January 10 and 12, 1959, it is apparent that they are not barred by either the two-year or the four-year statute of limitations; nor can plaintiffs' claims be considered barred by laches, since no extraordinary circumstances exist whereby said claims should be barred before the period of limitations has run. *Culver v. Pickens*, 1943, 176 S.W. 2d 167.

The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission the court is not fixing any just or reasonable rate or granting reparations.

Its action is solely ancillary to determining the effect of the stay orders and their dissolution. The rate settlement between plaintiffs and Transco does not preclude such a determination on grounds of estoppel because its refund clause plainly contemplated that there might be refunds that would be passed along to plaintiffs.

Plaintiffs are entitled to recover on the merits because the only lawful rates from June 7, 1954, until Mobil and Ohio received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission. This is true even though the contract rate was unfiled. Any rate changes provided for in the contract, filed or unfiled, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act. Natural Gas Pipeline Co. of America v. Harrington, supra; Bel Oil Corporation v. Federal Power Commission, 5 Cir., 1958, 255 Fed. 2d 548; Mississippi Power & Light Co. v. Memphis Natural Gas Company, 5 Cir., 1947, 162 Fed. 2d 388; Cities Service Gas Producing Co. v. Federal Power Commission 10 Cir., 1956, 233 Fed. 2d 726; Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 1956, 231 Fed. 2d 461; Phillips Petroleum Co. v. Federal Power Commission, 3 Cir., 1958, 258 Fed. 2d 906; Episcopal Theological Seminary v. Federal Power Commission, D.C., 1959, 269 Fed. 2d 228.

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio temporarily

allowed them to increase their prices above the June 7, 1954, level without approval by the Federal Power Commission. When those stay orders were dissolved and Mobil and Ohio filed their contracts with the Commission, the filings were accepted at the June 7, 1954, level. A duty of restitution arose, requiring Mobil and Ohio to restore to Transco amounts collected during the pendency of the stays in excess of the June 7 rate. Natural Gas Pipeline Co. of America v. Harrington, supra; Arkadelphia Milling Co. v. St. Louis S.W.R. Co., 1919, 249 U.S. 134, 39 S. Ct. 237, 63 L. Ed. 517; Berthold-Jennings Lumber Co. v. St. Louis I.R. & S. Ry. Co., 8 Cir., 1935, 80 Fed. 2d 32.

The stay orders cannot be construed as protecting Mobil and Ohio in the receipt of overcharges for two reasons: (1) courts do not have the authority to establish rates and construing the stay orders as approval of the increased rates imputes to the court an attempt to do indirectly what it cannot do directly and (2) although the stay orders, until dissolved, relieved Mobil and Ohio of the necessity, for the time being, of filing in accordance with Order No. 174-A, the stay orders neither by their terms nor by implication provided that Mobil and Ohio could retain monies collected during the pendency of the stay orders nor did the orders relieve them from the consequences of their failure to comply with Order 174-A. A stay order does not adjudicate rights but merely preserves the status quo. Scripps-Howard Radio, Inc. v. Federal Communications Commission, 1942, 316 U.S. 4, 62 S. Ct. 875, 86 L. Ed. 1229.

At the time the stay orders were issued, the lawful rates had been established as the contract rates of June 7, 1954. Natural Gas Pipeline Co. v. Harrington, supra. Since the Fifth Circuit could not authorize an increase in the lawful

rate, the stay orders could not have had that effect, and the court could have intended nothing more than to permit Mobil and Ohio to collect the higher rates until the final determination of that case. In the Berthold-Jennings and Arkadelphia cases the railroads obtained injunctions against the state railroad commission's enforcement of the established maximum freight rates, which injunctions permitted the railroads to collect higher rates. After the dissolution of the injunctions, the railroads were required to repay the overcharges they had collected on the theory of restitution. The fact that no bond had been required of the railroads after the granting of the permanent injunction did not alter the results.

In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them.

Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

Plaintiffs' first motion for summary judgment against Mobil and Ohio will be granted. Their second motion for summary judgment against Transco will be denied. Transco's first and second motions for summary judgment will be granted. The motions for summary judgment of Mobil and Ohio will be denied.

/s/ JOE INGRAHAM
United States District Judge

Trial Court's Memorandum Opinion November 23, 1960

In opinion filed June 29, 1960, plaintiffs, distributors of natural gas, were given restitution of monies paid by Transcontinental Gas Pipe Line Corporation (Transco) to its co-defendants, Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio), through increase in price for natural gas sold and delivered to Transco. Defendant and cross-plaintiff Transco's fourth motion for summary judgment and alternative motion for severance is before the court. This motion deals with Transco's right to recover from Mobil and Ohio, for the use and benefit of its customers other than plaintiffs' the sum of $56,120.41, together with interest thereon. This amount represents the difference between the sum of $937,793.32 which plaintiffs will recover from Mobil and Ohio under the rulings of this court and the total of $993,913.73 paid by Transco to Mobil and Ohio from February 1, 1955, to February 1, 1957, in excess of contract prices in effect on June 7, 1954. Names of these customers (other than plaintiffs) and amounts payable to each are found in the affidavit attached to this fourth motion.

Transco's alternative motion for severance will be denied. The subject matter of the so-called fourth motion has already been submitted to the court. This motion should be disposed of and not tried piecemeal. The claims asserted by plaintiffs and the claim sought to be asserted by Transco on behalf of its other utility customers arise out of the same factual circumstances. Should Mobil and Ohio appeal, the whole matter should be taken up. Fed. Rule Civ. Proc. 54(b) will not be used here.

Mobil's and Ohio's answers to the fourth motion of Transco urge two grounds for denial: (1) lack of jurisdiction in that no diversity, requisite amounts, or federal questions are shown; and (2) unresolved factual issues bar summary judgment. The court is however of opinion that jurisdiction is present and that no factual issues remain. Transco's fourth motion for summary judgment will be granted. These two supposed impediments will be disposed of separately.

Much is said at page two of Mobil's answer about lack of diversity and amounts involved. Mobil's briefs in support of its motion for summary judgment make the same argument. This court necessarily rejected these contentions by overruling Mobil's motions for summary judgment in their entirety. Further, Transco's motion is a cross-claim within Fed. Rule Civ. Proc. 13(g). As such it is ancillary to the related, principal claim. No independent jurisdictional basis need be laid for a cross-claim. 3 Moore's Federal Practice, Sec. 13.36 (2d Ed. 1948). Our circuit court so held in *Childress v. Cook*, 245 Fed. 2d 798, 802-805 (5th Cir. 1957).

Mobil and Ohio argue that certain factual issues are yet unsettled. These are said to prevent summary judgment. These issues summarized are what amounts, if any, of the gas sold to Transco was resold to these customers of Transco, not named as plaintiffs, and what amounts of money, if any, may be recovered by each customer from Mobil and Ohio. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the charges therefor. These issues are irrelevant for the reasons suggested in the opinion of June 29, 1960. They are disposed of at pages eleven and twelve thereof. The court remains of the view announced

at page eleven, second paragraph of the June opinion, ". . . there is no genuine issue as to any material fact . . ."

It necessarily follows from my rejection of severance of Transco's fourth motion that the form of judgment tendered by plaintiffs will not suffice. That form does not reflect this disposition of the fourth motion. The final judgment to be entered herein must include today's granting of Transco's motion. Mobil and Ohio level other criticisms at plaintiffs' proposed judgment. These will now be considered.

Plaintiffs have tendered a form of judgment which would permit recovery from Mobil of $643,363.30 and from Ohio the sum of $544,744.86. The figures recoverable as the excess over the rates of June 7, 1954, were respectively $508,384.56 and $429,408.76. Thus, plaintiffs have tendered a judgment which will permit them recovery of $250,314.84 in excess of the principal amount allowed by the opinion of June 29, 1960. This difference constitutes interest for the withholding of such sums from the dates on which such sums were received from Transco by Mobil and Ohio. At page three of plaintiffs' motions for summary judgment such interest was requested. This court so noted at page seven of the June opinion. Mobil and Ohio state that this opinion did not allow such interest, and hence plaintiffs's proposed judgment is excessive by this interest amount. In any event Mobil and Ohio strenuously object to allowance of interest on the principal. Briefs have been submitted which purport to show the impropriety of interest on a restitutory award.

While the matter received no explicit treatment in the opinion of June 29, 1960, an award of interest may be implied from the granting of plaintiff's first motion for

summary judgment against Mobil and Ohio at page eleven therein. That motion included a request for interest. The issue deserves a fuller treatment. I conclude that such interest should be allowed. The governing principle is well stated in Restatement, Restitution, Sec. 156 (1937):

> ". . . A person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if: . . . (b) the value of the benefit can be ascertained by mathematical calculation from the terms of an agreement between the parties or by established market prices . . ."

The comment to this section at page 620 notes the obligation to pay interest from the time when the money should have been paid. Our court of appeals cited the Restatement in an analogous case to support a similar award of interest. *Natural Gas Pipeline Co. of America v. Harrington*, 246 Fed. 2d 915, 921 (5th Cir. 1957). This case is determinative of plaintiffs' right to recover interest on the excess payments, at least from February 1, 1957, the date of dissolution of the stay order. Natural Gas paid an increased price pursuant to an Oklahoma minimum price order. That der was invalidated by the United States Supreme Court; latural Gas sued for recovery of excess payments. The court of appeals held that interest should accrue from the date the minimum price order was invalidated.

Okeechobee County, Fla. v. Nuveen, 145 Fed. 2d 684, 687 (5th Cir. 1944), indicates the district courts are vested with considerable discretion in the awarding of interest damages upon restitutory sums. Considerations of fairness and traditional equitable principles are to guide the exercise

of this discretion. Allowance of interest seems best to accord with these guide-lines in this instance. The cases cited by Mobil and Ohio have been considered. They too stress this discretionary role. This interest is allowed as a means of compensating plaintiffs' loss of use of their monies.

Additional interest difficulties remain. Plaintiffs and defendants are not in accord on the period for commencement of this interest. Plaintiffs say interest should run from the date the respective monthly payments were made by Transco to Mobil and Ohio. They have so computed interest in their form of judgment. Mobil and Ohio argue that such starting points are not consonant with the court's memorandum in June. They conclude from that opinion, especially page eight, that they were entitled to collect, during the stay period, the contractual increases. Under the court's rationale, they declare, there could be no duty of restitution during that period. They cite page thirteen of the opinion as indicating the cause of action in restitution arose on February 4, 1957. Necessarily, the court is told, no interest can be claimed before that date, for no duty of restitution existed prior thereto.

Defendants' argument has considerable logical appeal. Yet, Mobil and Ohio have had the use of this money from the date of its receipt. Similarly, plaintiffs have been deprived of the use of such funds from the time these increased rates were reflected in Transco's charges to them. Equitable considerations compel the conclusion that interest should commence from the respective dates of Transco's overpayments to the defendants. Plaintiffs' motion for judgment so provides. *Mississippi River Fuel Corp. v. Federal Power Commission*, 281 Fed. 2d 919 (D.C. Cir. 1960), supports this conclusion, the ruling of the Federal Power

Commission in a similar interest question is therein approved. The commission ordered ". . . interest at the rate of 6 per cent per annum from the date of receipt of such excess amounts to the date of refund." 21 F.P.C. 48, 53. Language in *Natural Gas Pipeline Company of America v. Harrington*, supra, buttresses this result. The factual situation of this case has been referred to, supra. The court of appeals granted interest from the date the minimum price order was held invalid. Interest before that date was declined because the recipient of increased prices had not received them due to its fault or volition. Here, however, as noted at page eighteen of my prior opinion, Mobil and Ohio actively sought and obtained the stay order. The excess charges were not of the windfall variety present in Harrington. They came to Mobil and Ohio due to their own volition. They should pay interest on the funds withheld from the time of their receipt, not just from February 7, 1957.

There remains one other question with regard to interest. Plaintiffs have accrued interest prior to the rendition of the judgment and included such interest in the principal sum as interest damages. Then they provide in their tendered judgment that the amounts set forth in the judgment shall bear interest at the rate of 6% per annum. Defendants claim plaintiffs have thus figured the interest contrary to the rule that compounded interest is not allowed in the absence of a contract providing therefor. *Cherokee Nation v. United States*, 270 U.S. 476 (1926), is said to be contrary. The Texas rule allegedly prevents this. *McDaniel v. Miller*, 317 S.W. 2d 546, 549 (Ct. Civ. Apps. 1958), is cited. The court therein held it to be improper to include interest as a part of the principal sum of the judgment and

then allow the judgment to draw interest at the rate of 6% per annum. Plaintiffs' answer to Ohio's reply to its motion for judgment at pages six and seven admits McDaniel is contrary to their view. They cite earlier cases from Texas as presenting a different view; McDaniel is "wrong", plaintiffs declare. It is clear that this is a matter to be determined by state law. *T. & M. Transport Co. v. Shattuck Chemical Co.*, 158 Fed. 2d 909 (10th Cir. 1947); *Herd & Co. v. Krawill Machinery Corp.*, 256 Fed. 2d 946 (4th Cir. 1958), aff'd 3 L. Ed. 2d 820 (1959).

The Texas cases are rather confusing on this matter. On the one hand, as indicated supra, McDaniel denies interest on that portion of the judgment which constitutes interest on the principal. Plaintiffs cite five earlier cases which they say are contrary to McDaniel. None of these five are cited in McDaniel; indeed, the Texas Court of Civil Appeals cited no authority for its holding therein. *Frazier v. Campbell*, 5 Tex. 275 (1849), is said by plaintiffs to first establish the law in Texas on this issue. It is true that the Supreme Court of Texas allowed interest on a judgment containing interest; the case, however, may be distinguishable in that the instrument sued upon specified what interest the principal was to bear. In this case the interest granted herein on the principal was not consensual in origin but judicially allowed. *Miner v. Paris Exchange Bank*, 53 Tex. 559 (1880), alludes to *Frazier*, supra, but it is inapposite, for it concerns usury, not interest on judgments. The remaining cases cited by plaintiffs allowed interest on that portion of the judgment which constituted interest. On first reading they seem to conflict with McDaniel. All however involve consensual or contractual interest on a principal. Like Frazier, they concern instruments carrying in their

provisions interest. McDaniel is more analogous to the present situation, for it dealt with a judgment for judicially-imposed interest. McDaniel must guide my decision. Hence, interest will be granted only on that portion of the judgment which constitutes principal and not interest.

Mobil and Ohio have further objections to the tendered form of judgment. The first paragraph following the figures on page three of the proposed judgment grants judgment against plaintiffs and in favor of Transco on plaintiffs' suit against Transco, but awards court costs thereon to Transco against Mobil and Ohio. As to that such costs should be taxed against plaintiffs. Mobil properly objects to being taxed for plaintiffs' failure in that respect.

Said judgment as drawn constitutes a taxation of costs jointly against Mobil and Ohio. The causes of action against the two were different. The only common fact was that both sold gas to Transco. No basis appears for joint taxation of costs against Mobil and Ohio. Hence, costs will be taxed separately against Ohio and Mobil, The costs of the fourth motion of Transco will be taxed separately against Ohio and Mobil.

A notice of appeal was included in the form of judgment. Mobil and Ohio object thereto, preferring to give their own. The notice of appeal will be deleted from the proposed judgment.

I now summarize the conclusions arrived at herein. Transco's alternative motion for severance will be denied, while its fourth motion for summary judgment will be granted. Interest on the principal sum involved in said fourth motion may accrue from the time of the respective overpayments by Transco to Mobil and Ohio. The form of judgment next tendered must reflect this disposition of

the fourth motion. Plaintiffs' proposed form of judgment properly contains interest on the principal computed from a series of beginning dates arising prior to February 1, 1957. Interest on the judgment itself may be computed only on that portion of the judgment which constitutes principal. For example, plaintiffs' interest figure of $250,-314.84 may not itself bear interest. Costs will be taxed separately against Mobil and Ohio. Plaintiffs will bear the costs of their failure to obtain judgment against Transco. No notice of appeal will be included.

The clerk will notify counsel to draft and submit appropriate judgment.

/s/ JOE INGRAHAM
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY,INC.,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18942

THE OHIO OIL COMPANY,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18943

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellants,

versus

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Appellees.

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

versus

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.

Appellees.

Appeals from the United States District Court for the Southern District of Texas

(February 14, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: These appeals from summary judgments of the United States District Court for the Southern District of Texas present many interesting questions of law. The district judge, in a memorandum opinion,[1] set forth these questions clearly and dealt with them in a thorough and completely correct way. It would serve no useful purpose, therefore, for us to set the questions out or discuss them in detail here. It is sufficient to say that it is our view that the judgments should be affirmed throughout upon the opinion of the district judge.

Summed up, the appeals present on the side of the appellants, Socony Mobil Oil Company, Inc., Et Al., the primary contentions: (1) that because of a stay order entered by this court in *Magnolia Petroleum Co. v. Federal Power*

[1] Brooklyn Union Gas Co., et al. v. Transcontinental Gas Pipeline Corp., et al. (6-29-60) —F. Supp.—

Commission, 236 F (2) 785 in an appeal from Order No. 174-A of the Federal Power Commission, the rates collected by the appellants were legal and proper, and when the appeal was decided against the appellants by a dismissal and the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required as to them; and (2) that the proof failed to make out a case for restitution.

As the opinion of the district judge points out, this view proceeds from a misapprehension of the nature and effect of the stay order and of the state of the applicable law. As he also points out, this court dismissed the appeal in which the stay order was entered on the ground that Order No. 174-A , which was attacked by the appellants in that case, was not an appealable order, and this court did not, either in the order dismissing the appeal or in any other order entered by it, undertake to in any way validate the rates collected by the appellants. As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained.

Here the evidence is undisputed that the proposed rates collected by the appellant, the recovery back of which was ordered by the district judge, were not filed with the Com-

mission until long after they were collected, and equally undisputed that this Court did not authorize, or attempt to authorize, the collection of any particular rate. It merely provided a stay of Commission action during the pendency of the appeal, and when the appeal was dismissed by this court and review was later denied by the Supreme Court, the stay order expired and lapsed, and the parties to the collection and payment of the rates in question were then remitted to the statutory law to determine their rights on the issue of restitution.

In addition to the attack on the judgments as unwarranted because the rates collected by them had been collected under a valid contract, appellants attack the judgment as erroneous because the claims against them were barred by limitation.

The district judge dealt carefully with this claim and we think correctly denied it. As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations. Its action was solely ancillary to determining, the effect of the stay orders and their dissolution, and of the failure of appellants to file their proposed changes of rates as required by statute and the regulations of the Commission. The rate settlement between plaintiffs and Transcontinental does not preclude such a determination on grounds of estoppel because the refund clause of the agreement between Transcontinental and Brooklyn plainly declared that there might be refunds and that if there were, they would belong to the consumer plaintiffs.

Plaintiffs were entitled to recover on the merits because the only lawful rates from June 7, 1954, until appellant received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A, the contract rates in effect on June 7, 1954, the date of the Phillips decision, were the only lawful rates which could be collected until changed by filing the proposed changes with the Federal Power Commission as required by statute. Any rate changes provided for in the contract, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission.[2]

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio et al. did no more than prevent the Commission from interfering with the collection by Mobil and Ohio et al. of rates above the June 7, 1954 level. When these stay orders were dissolved, and Mobil and Ohio et al. filed their contracts with the Commission and the filings were accepted at the June 7, 1954, level, a duty of restitution arose, requiring Mobil and Ohio et al. to restore to Transcontinental and/or plaintiffs amounts collected during the pendency of the stays in excess of the June 7th rate.[3]

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[2]Natural Gas Pipeline Co. of American v. Harrington, 246 F. (2) 915; Bel Oil Corp. v. Federal Power Commission, 255 F. (2) 548; Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F. (2) 388.

[3]Natural Gas Pipeline Co. v. Harrington, 246 F. (2) 915; Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U.S. 134.

The stay orders cannot be construed as protecting Mobil and Ohio et al. in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et al. action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. *United Gas Pipeline v. Mobile Gas Co.*, 350 U. S. 332 at 347. The stay orders neither by their terms nor by implication provided, nor could they have provided, that the statute and the regulations of the Commission, legislative in nature as they were, would not have to be complied with in order to effect a change in the rates, and nothing in the stay orders stated or implied that Mobil and Ohio et al. could retain monies collected during the pendency of the stay orders on rates put into effect without complying with the statute and regulations.

A stay order does not adjudicate rights. It merely preserves the status quo. The status quo here was that until the proposed changes in rates by escalation or otherwise, were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored. At the time the stay orders were issued, the lawful rates established, by virtue of the Act and the regulations of the Commission, were the contract rates of June 7, 1954. The stay orders did not deal

with, or attempt to change, this situation at all. This court did not, indeed could not, authorize an increase in the lawful rates. Such authority could be granted only by a compliance with the statute and regulations promulgated under its authority. The stay orders could not have had any effect on the statutory scheme. We think the court can not do better than to adopt the opinion of the district judge and affirm his judgments on the basis of it.

Another question raised in the case by the defendants-appellees arises out of the fact that, while the contract was made by the appellants with the Transcontinental Gas Pipe Line Corporation, the suit was brought by and for the benefit of Transcontinental's customers with Transcontinental intervening. Appellants-defendants, therefore, insist that there is no privity of contract between them and these customers and that there is no right of action in the customers to recover from them.

We think the district judge was right in respect of these contentions under the record in this case, which contains a notation in an order of the Commission in connection with the settlement made by Transcontinental with the plaintiffs, that any recoveries back which Transcontinental might be entitled to should be for the benefit of its customers. On the pleadings and the undisputed facts in this case, plaintiffs were real parties in interest and entitled to judgment as such.

In addition to these questions, there is a question which is brought up on the appeal of plaintiffs in the suits. This question is whether the judgment was wrong in not allowing interest on interest. These appellants insist that the judgment, which was for the amount of the unlawful rates collected without interest up to but not after the date of the

judgment, was erroneous, and that judgment should have been for the amounts collected with interest to the judgment date, and this entire amount should have then borne interest from the date of the judgment.

The district judge was of the opinion that to allow a judgment such as this would be to allow compound interest and that the prevailing Texas rule, as stated in *McDaniel v. Miller*, 317 S.W. (2) 546, prevents this. The appellants, while conceding that the state of the law in Texas is confusing on this matter, argue that the McDaniel case is not controlling authority in Texas; that for its particular facts, the case was properly decided, but that *Frazier v. Campbell*, 5 Texas 275 and *Miner v. Parish Exchange Bank*, 53 Texas 559, decided the contrary.

While it is true that there is considerable confusion in the Texas decisions, we are inclined to follow Judge Ingraham's view[4] that the McDaniel case is authoritative here, and we are, therefore, of the opinion that the judgment should be affirmed on the plaintiffs' appeals as well as on the defendants' appeals.

We think the case was well tried throughout and, no substantial error appearing, the judgments are

AFFIRMED

[4]Brooklyn Union Gas, et al. v. Transcontinental Gas Pipeline Corp., et al. (11-23-60) —F. Supp.—

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18943

D. C. Docket Nos. 12474 and 12482 Civil

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellants,

versus

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before Tuttle, Chief Judge, Hutcheson and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and as argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 14, 1962.

APPENDIX B

Excerpt From Section 4 of the Natural Gas Act of June 21, 1938, 52 Stat. 821, 822, as amended, 15 U.S.C. 717c:

* * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take

effect and the manner in which they shall be filed and published.

* * *

Excerpt From
Federal Power Commission Order No. 174-A, Issued August 6, 1954 (19 F.R. 5081)

* * *

§ 154.91 "Independent producer" defined. An "independent producer" as that term is used in §§ 154.91 to 154.102 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

§ 154.92 Filing of rate schedules by producer-gatherer "Natural-Gas Companies." (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

* * *

§ 154.94 Changes in rate schedules. (a) No change shall be made in any rate, charge, or service in effect on

and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Orders

Order approving proposed rate settlement
Transcontinental Gas Pipe Line Corp.
Docket Nos. G-5258 and G-8487
November 7, 1955

By order issued November 26, 1954, at Docket No. G-5258, the Commission suspended until April 1, 1955, the following revised sheets to Transcontinental Gas Pipe Line Corporation's (Transco) FPC Gas Tariff Original Volume No. 1, which were filed October 29, 1954:

Rate Schedule	Tariff Sheet Designation
CD-1	Sixth Revised Sheet No. 5 and Fifth Revised Sheet No. 9.
CD-2	Sixth Revised Sheets Nos. 12 and 16.
CD-3	Third Revised Sheets Nos. 17-B and 17-F.
G-1	Fifth Revised Sheet No. 19.
G-2	Fifth Revised Sheet No. 24.
G-3	Second Revised Sheet No. 26-B.
LTF	Fourth Revised Sheet No. 28-I.
S-2	First Revised Sheets Nos. 28-P and 28-Q.[1]

The suspended revised sheets proposed an increase in rates of approximately $3,204,000 above the rates which the Commission had approved in Docket No. G-2439 and which had become effective September 1, 1954.

By order issued December 28, 1954, the Commission permitted the filing of the following further revised tariff sheets to be substituted for the revised tariff sheets suspended by the order of November 26, 1954:

[1]First Revised Sheet No. 28-Q was not subsequently modified or amended, nor has a motion been made by Transco to put the sheet into effect.

Rate Schedule	Tariff Sheet Designation
CD-1	Seventh Revised Sheet No. 5 and Sixth Revised Sheet No. 9.
CD-2	Seventh Revised Sheets Nos. 12 and 16.
CD-3	Fourth Revised Sheets Nos. 17-B and 17-I.
G-1	Sixth Revised Sheet No. 19.
G-2	Sixth Revised Sheet No. 24.
G-3	Third Revised Sheet No. 26-B.
LTF	Fifth Revised Sheet No. 28-I.
S-2	Second Revised Sheet No. 28-P.

The Commission suspended these revised sheets until February 1, 1955.[2] The suspended substitute revised sheets proposed an increase of $796,000 in addition to the $3,204,000 suspended by the Commission order issued November 26, 1954.

By order issued February 11, 1955, the Commission permitted the proposed revised tariff sheets (except First Revised Sheet No. 28-Q) to become effective as of February 1, 1955, subject to the filing of a refund undertaking.

By order issued February 18, 1955, at Docket No. G-8487, the Commission suspended until April 1, 1955, other revised tariff sheets to Transco's FPC Gas Tariff Original Volume No. 1, which were filed on January 20, 1955, as follows:

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[2] At the same time, the suspension period of First Revised Sheet No. 28-Q was reduced to February 1, 1955.

Rate Schedule	Tariff Sheet Designation
CD-1	Eighth Revised Sheet No. 5 and Seventh Revised Sheet No. 9.
CD-2	Eighth Revised Sheets Nos. 12 and 16.
CD-3	Fifth Revised Sheets Nos. 17-B and 17-F.
G-1	Seventh Revised Sheet No. 19.
G-2	Seventh Revised Sheet No. 24.
G-3	Fourth Revised Sheet No. 26-B.
LTF	Sixth Revised Sheet No. 28-L.
S-2	Third Revised Sheet No. 28-P.

These proposed revised sheets would have had the effect of increasing Transco's rates $2,176,000 over and above the approximately $4,000,000 increases referred to above. By order issued April 15, 1955, the Commission permitted these latter revised sheets to become effective as of April 1, 1955, subject to Transco's refund undertaking.

Pursuant to the Commission's order of May 26, 1955, which consolidated the proceedings in Docket Nos. G-5258 and G-8487, the matter came for hearing and was heard beginning on June 20, 1955. On September 20, 1955, the presentation of evidence by Transco and the Staff of the Commission had been completed and a recess was then taken to afford certain interveners an opportunity to prepare evidence for presentation. When the hearing was reconvened on October 5, 1955, Counsel for appellant, Transco, announced that a settlement of the issues involved in the proceedings had been arrived at between the parties thereto and requested that such proposed settlement be transmitted to the Commission for its consideration and disposition.

Under the terms of the proposed settlement Transco will, upon approval by the Commission, file with the Commission revised tariff sheets providing for the following rates

to become effective on October 1, 1955, superseding the rates presently in effect under an undertaking at Docket No. G-8487:

Type of service	Rate schedule	Monthly demand charge per Mcf	Commodity charge per Mcf
Contract demand	CD-1	$1.861	Cents
	CD-2	2.[illegible]	21
	CD-3	2.28[illegible]	25
General service	G-1	2.155	[illegible]
	G-2	[illegible]	21
	G-3	3.257	25
Limited term firm	LTF	2.88[illegible]	26
Storage service	S-2	2.57312	
For gas delivered			20.[illegible]7
For gas nominated for return by customers			16.[illegible]7

The commodity rates which Transco will accept in the proposed settlement are six mills (.6¢) per Mcf lower than those currently in effect at Docket No. G-8487. Additionally, Transco is to refund to each of the customers who purchased gas during the period from April 1, 1955 to October 1, 1955 under Transco's Rate Schedules CD-1, CD-2, CD-3, G-1, G-2, G-3 and LTF the sum of four mills (.4¢) in respect to each Mcf of gas so purchased during that period, plus interest at 6% per annum from the dates of payment thereto to Transco.

Transco is also to refund four mills per Mcf for gas delivered from storage during the period April 1, 1955, to October 1, 1955, to each buyer under Transco's Rate Schedule S-2, plus interest at 6% per annum from the date of payment therefor to Transco.

Transco is to make the above refunds within 30 days from the issuance of the Commission's order approving the proposed settlement.

The proposed settlement also provides that in the event any of Transco's suppliers whose rates are currently in effect under bond or whose rates are currently being charge under court stay orders shall be required to make refunds to Transco in respect to gas supplied under rates fixed under bond or stay order, such portion, if any, of such refund (including interest thereon) attributable to gas purchased from the supplying company by Transco after Transco's rates were permitted to become effective to cover such increased cost of gas shall be refunded by Transco within sixty days to its utility customers. In the event any supplying companies are required to make reductions in the rates to be charged for gas sold to Transco below those reflected in the cost of service schedules in the instant proceedings, then Transco will file with the Commission, within 60 days, changes in its rate schedules to reflect the net reduction in such a way that Transco neither gains nor loses with respect to its jurisdictional business as a result of such changes. Such rate schedule changes shall be effective as of the date or dates when the lower rate becomes effective to Transco, or at the end of the refund period, if refunds are made to Transco and refunded to the utility customers.

The proposed settlement also provides that in respect to Transco's suppliers who are currently serving Transco under temporary certificates issued by the Commission or who have not yet been authorized to make deliveries to Transco, that in the event such gas or any part thereof becomes unavailable to Transco, then Transco will file with the Commission changes in its rates to reflect the net reduction in its cost in such a way that Transco neither gains nor loses with respect to its jurisdictional business.

No price adjustments are to be made by Transco, however, unless or until the aggregate amount thereof would exceed $200,000.

On the basis of 196,500,000 Mcf of annual sales and transportation the six-mill reduction in commodity rate which Transco has agreed to accept in the proposed settlement would reduce its revenues $1,122,657. This amount combined with the $501,054 deficiency in revenues shown by the cost of service for the test year ended March 31, 1955, would, in the absence of any other factor, indicate an annual deficiency of $1,623,711. However, the company stated on the record that on or about November 1, 1955, Transco will put into operation substantially added capacity which will be provided by the facilities authorized by the Commission in Docket Nos. G-2367 and G-4185; Also, that it is expected by Transco that the facilities to provide for 10,000 Mcf of daily transportation deliveries for Sun Oil Company authorized by the Commission in Docket No. G-9035, will be placed in operation on or about November 1, 1955, and that the revenue flowing from these several added facilities will improve somewhat the figures shown in Transco's and the staff's cost of service exhibits in Docket No. G-8487. Further assuming both Transco's revenues and cost of service remain unchanged, the revenues at the settlement rates would produce a return to Transco which would be within the range of reasonableness.

Settlement of the proceedings on the basis described herein was agreed to by applicant and the parties and stated upon the record October 5, 1955.

The settlement herein proposed does not make mention of the fact that Federal income tax rate of 52% will

under existing law, become 47% on April 1, 1956, and no provision is made for a change in Transco's rates on that account upon the contingency that a lower income tax rate becomes effective on that date. In order that Transco's rates may be placed upon a realistic basis, not only now but in the future, it is imperative that provision be made to reflect any change in Federal income tax liability, if a change in the existing tax rate becomes effective. Accordingly, an appropriate provision will be included in our order to provide for such a contingency.

The Commission *finds:*

(1) The proposed settlement of these rate proceedings on the basis heretofore described, subject to the terms and conditions hereinafter ordered, is appropriate and in the public interest in carrying out the provisions of the Natural Gas Act, and should be approved and made effective as hereinafter provided and ordered.

(2) Transco has not filed a motion under Section 4(e) of the Natural Gas Act to make effective First Revised Sheet No. 28-Q which was filed October 29, 1954, to be effective November 1, 1954, and suspended in Docket No. G-5258 originally until April 1, 1955, and subsequently to February 1, 1955, or such time thereafter as provided by the Natural Gas Act. In view of the settlement of these rate proceedings as approved in (1) above, First Revised Sheet No. 28-Q serves no useful purpose in Transco's tariff and therefore should be remanded.

The Commission *orders:*

(A) The increase in rates and charges embodied in Transco's rate increase filings of October 29, 1954, November 26, 1954, and January 20, 1955, as modified by Transco's filing of May 12, 1955, be and the same are hereby disallowed.

(B) Within 10 days after issuance of this order Transco shall file with the Commission revised tariff sheets being the same as those appearing on pages 858 to 868, both inclusive, of the transcript of record for October 6, 1955, Docket Nos. G-5258 and G-8487, containing the rates stated on page 1077 hereof, for its CD-1, CD-2, CD-3, G-1, G-2, G-3, LTF and S-2 rate schedules, to become effective October 1, 1955, supplanting the rates presently in effect under Transco's undertaking to refund in Docket No. G-8487.

(C) Transco shall refund, within 30 days of the date of issuance of the order herein, to each of its customers who purchased gas during the period from April 1, 1955, to October 1, 1955 under Transco's CD-1, CD-2, CD-3, G-1, G-2, G-3 and LTF rate schedules and for gas delivered during the same period under Transco's S-2 rate schedule the sum of four mills (.4¢) in respect to each Mcf of gas purchased or delivered, as stated above, during that period, plus interest at 6% per annum on such refunds from the dates of payment therefor to Transco. Within 45 days from the date of issuance of this order Transco shall report in writing and under oath to the Commission the amount of refunds to each customer receiving refunds and shall serve a copy of such report upon each of Transco's utility customers.

(D) In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of such refund attributable to natural gas purchased from said supplying company or companies

by Transco after Transco's increased rates were permitted to become effective to cover such increased cost of gas shall be refunded to Transco's utility customers within sixty days after receipt of such refund by Transco. The amount of refund determined, as above stated, and any interest thereon, shall be divided by the total Mcf of sales during the refund period, exclusive of interruptible direct sales but including deliveries from storage under Rate Schedule S-2. The rate per Mcf so computed shall then be multiplied by the total Mcf of sales to each utility customer during such period under Rate Schedules CD-1, CD-2, CD-3, G-1, G-2, G-3, LTF and S-2 (deliveries from storage only) and the amount so determined shall then be refunded to that customer. Report to the Commission upon refunds under this Paragraph shall be made within 15 days of the payment of such refunds in accordance with the procedure heretofore prescribed in Paragraph (C) for the refunds there considered.

(E) In the event the quantities of gas or any part thereof of Transco's suppliers who are currently serving Transco under temporary certificates issued by the Commission or who have not yet been authorized to make deliveries to Transco becomes unavailable to Transco, then Transco shall file with the Commission changes in its rates to reflect the net reduction in its cost in such a way that Transco neither gains or loses with respect to its jurisdictional business. In the event any of such supplying companies are required to make reduction in the rates to be charged for gas sold to Transco below those reflected in the cost of service schedules in the instant proceeding, then Transco shall file with the Commission changes in its rate schedules to reflect the net reduction in such a

way that Transco neither gains nor loses with respect to its jurisdictional business as a result of such changes. Such rate reductions shall be filed within 60 days of the final order of the Commission or court of competent jurisdiction which determines the unavailability of gas to Transco or which requires a reduction in rates to Transco provided that Transco shall not be required to change its rate schedules to reflect such rate reductions until the aggregate net reduction in cost because of unavailability of gas or reduced rates of suppliers, computed in accordance with the procedure set forth in Articles VI and VII of the settlement herein approved, exceeds $200,000. Such rate reductions when refunds have been made pursuant to Paragraph (D) hereof, shall be effective as of the end of the refund period. Such reductions, when the rates of Transco's suppliers are reduced but refunds are not required to Transco from supplier, shall be effective as of the date or dates when such lower rate to Transco by the supplier or suppliers becomes effective. Such reductions, when required because of the unavailability of gas to Transco, shall become effective October 1, 1955, in the case of supplying companies, Shell Oil Company and Phillips Petroleum Company, with respect to Bear Field, and as of the first day of the month following which delivery of gas from each of the other suppliers (delivering gas under temporary certificates issued by the Commission is terminated. The rate changes pursuant to this Paragraph shall be made to the commodity charges (to the nearest one-tenth of a cent (.1¢) of Rate Schedules CD-1, CD-2, CD-3, G-1, G-2, G-3, LTF and S-2 (gas delivered from storage only)).

(F) In the event that the Federal income tax rate, on and after April 1, 1956, becomes 47% instead of 52% as provided by existing law, or any lower percentage of net income than 52%, by reason of a change in existing law, then Transco shall file within 30 days from the date of such change in the tax rate revised schedules of rates to reflect the change in the tax rate so that the rates herein provided will reflect income taxes upon the changed basis, making use of the identical figures upon which the 52% of Federal income tax was figured in the settlement herein approved. The effective date of such change in Transco's rates shall be the same as the date upon which the new tax rate becomes applicable.

(G) Within 30 days from the date of issuance of this order Transco shall file an appropriate tariff sheet to remove First Revised Sheet No. 28-Q from its tariff.

(H) Upon compliance with the terms of this order the proceedings at Docket Nos. G-5258 and G-8487 shall be terminated.

(I) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in any proceeding now pending or hereafter instituted by or against Transco.

Commissioner Draper not participating.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 344

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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September, 1962

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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BRIEF OF RESPONDENT IN OPPOSITION

This cause is a companion case to three others at this term: No. 300, Socony Mobil Oil Company, Inc. v. Brooklyn Union Gas Company, et al; No. 303, Marathon Oil Company v. Brooklyn Union Gas Company, et al; and No. 339, Transcontinental Gas Pipe Line Corporation v. Brooklyn Union

Gas Company, et al. The parties are referred to herein as they have been in the petition and the petitions in these related cases.

QUESTIONS PRESENTED

Petitioners seek to pose the questions whether:

1. Transco was under an obligation to exercise reasonable diligence to secure for Petitioners' benefit refunds from Mobil and Ohio?

2. Transco is liable to Petitioners whether or not it has collected or may collect or ever could have collected certain claimed overpayments from Mobil and Ohio?

It is respectfully submitted that neither of the questions Petitioners seek to pose had or now has any real bearing on a proper resolution of the controversy involved in these companion cases. In addition, these questions certainly are not the type of questions warranting certiorari.

STATEMENT

The nature and results of the case are correctly stated in Petitioners' Statement. The only exception Respondent deems appropriate is to that portion of the Statement in the last paragraph on page 7 reading: ". . . Petitioners were, therefore, required to [appeal from the trial court judgment] in order to preserve their cause of action against Transco and to prevent the take nothing judgment from becoming final."

As this case was brought, submitted and decided, Petitioners' rights, if any, against Transco were and are completely immaterial to the ultimate disposition.

ARGUMENT

No Grounds for Review are Shown by Petitioner

Rule 19, which fixes the standard for granting writs of certiorari, requires that there be "special and important" reasons.

Petitioners tacitly recognize that the questions which they seek to present are not within the scope of Rule 19 in their suggestions as to "Reasons for Granting the Writ" (Petition 8). As appears from the face of the "Reasons": no federal question is presented by the petition; the questions involved are neither of general nor public importance; the decisions of the District Court and the Court of Appeals are not in conflict with the decision of another Court of Appeals; nor is the decision in conflict with applicable state law on "important state or territorial questions." As this court has previously stated, only "real and embarrassing conflicts of opinion and authority" justify intervention by writs of certiorari. *N.L.R.B.* v. *Pittsburg S.S. Co.*, 340 U.S. 498, 95 L. Ed. 479; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 99 L. Ed 897 and *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L. Ed. 712.

None of these standards is met by either question Petitioners seek to pose.

The Judgments of the District Court and Court of Appeals are Correct

Actually the "questions presented" stated by Petitioners are not present in this case.

The pertinent provisions of the Federal Power Commission settlement order of November 7, 1955 (quoted at page 6 of the petition) divested Transco of any beneficial interest whatsoever in possible refunds from Mobil and Ohio and vested all beneficial interests therein in Petitioners and Transco's other customers.

Both the District Court and the Court of Appeals correctly held that during the pendency of the stay orders Mobil and Ohio were entitled to demand and collect the contract rates under their respective contracts with Transco, but their right to keep any amounts so collected in excess of the contract rates in effect on June 7, 1954 depended upon the outcome of the litigation they were pursuing against the Federal Power Commission denying its jurisdiction over them. Likewise both Courts below correctly held that in 1957 when Mobil and Ohio failed in such litigation and the stay orders terminated, a cause of action arose in favor of the real parties in interest (Petitioners and Transco's other customers) to recover from Mobil and Ohio the amounts collected by them in excess of the June 7, 1954 contract rates under the protection of the stay orders.

As the settlement order was entered by the Federal Power Commission in 1955, at any time after its entry Petitioners could have filed suit to assert such rights as they claimed to refunds. This could have been done during the pendency of the stay orders if Petitioners believed any cause of action then existed, which they obviously did not. Certainly suit could have been brought as readily in 1957 when the stay orders terminated and any cause of action accrued as in January of 1959.

The only question in this cause is simply whether Mobil and Ohio are entitled to keep the amounts collected by them in excess of their June 7, 1954 contract rates with Transco prior to their compliance with Federal Power Commission Orders 174 and 174A in 1957. If Mobil and Ohio are not entitled to keep such payments then since the 1955 settlement such money belonged to Petitioners and Transco's other customers.

If Mobil and Ohio were entitled to keep such money, then Petitioners were and are entitled to nothing.

Transco has throughout this litigation declined to take a position on Mobil and Ohio's liability to make restitution

other than to insist as a use-plaintiff that its many small customers other than Petitioners receive the same treatment as Petitioners.

The questions presented by Petitioners are at most purely procedural and in fact are mechanical.

Any refund obtained from Mobil and Ohio concededly belongs to Transco's customer companies; in this litigation, from Transco's standpoint, it is and at all times was immaterial whether Petitioners recovered directly against Mobil and Ohio or whether, as a matter of mechanics, Petitioners recovered against Transco and Transco had judgment over against Mobil and Ohio and accounted to Petitioners.

Both the District Court and the Court of Appeals readily recognized the nature of this problem and correctly concluded that in the case of Petitioners the judgment appropriately should be directly against Mobil and Ohio rather than the more complicated form of recovery from Transco with Transco recovering over from Mobil and Ohio.

We respectfully submit that no question more profound than this mechanical one is tendered by Petitioners who are confronted with the inescapable fact that they brought this lawsuit; that at any time after the settlement in 1955 and certainly at any time after the dissolution of the stay orders in 1957, at which point both Courts below held the cause of action arose, they could have brought the lawsuit. If they waited too long, which both Courts below held they did not, they have only themselves to blame. Transco at all times freely acknowledged (as it was bound under the settlement order of the Federal Power Commission to do) that it neither had nor claimed any beneficial interest in the subject matter of the litigation.

If for some reason this Honorable Court should conclude that both the District Court and the Court of Appeals erred and that Mobil and Ohio were entitled to keep the monies collected in excess of the June 7, 1954 contract rates during the pendency of the stay orders, we submit such

adjudication of the merits would conclude Petitioners' rights as well as Transco's.

If, on the other hand, this Honorable Court concludes the judgments of the District Court and Court of Appeals were correct, no reason exists to revise the mechanics implementing the judgment.

The one case cited by Petitioners, *Empire Gas and Fuel Co.* v. *Pendar*, 244 S.W. 184 by a Texas Court of Civil Appeals, illustrates the lack of merit in Petitioners' contentions. Pendar as Lessor and Empire as Lessee entered into an oil and gas lease by the terms of which Empire promised and agreed to commence drilling a well on the leased premises within 60 days from the date of the lease; complete the same either as a producing well or abandon it as a dry hole; and at 90 day intervals thereafter continue to drill additional wells until such time as the leased premises were thoroughly developed for oil and gas. In addition to the royalties provided in said lease, Empire promised to pay Pendar the sum of $30,000 out of oil produced from the lease.

Empire totally breached its solemn written contract. It did not drill any well and it refused to pay Pendar the $30,000. The Court of Civil Appeals in affirming the judgment of the Trial Court stated two governing rules of law:

> "1. That a party who agrees to pay a sum of money in a certain commodity which he is to produce and who fails to produce such commodity is bound to pay the amount stipulated in money; and
>
> "2. If proof is necessary to show that the commodity could have been produced, the burden is upon the party breaking its agreement to show that, if the agreement had been kept the commodity would not have been produced."

On neither rule do Petitioners come within the case. There was no undertaking on Transco's part to "produce" the refunds from Mobil and Ohio; Transco's express under-

taking was to account and pay over to its customer companies any refunds from Mobil and Ohio, which obligation Transco never denied. As to the second rule stated in this case relied upon by Petitioners, this litigation and the judgments rendered herein will provide a complete and absolute answer to the question of whether "the commodity would have been produced." If Mobil and Ohio are entitled for some reason to keep the overpayments then that is a complete answer binding upon both Transco and Plaintiffs; if, on the other hand, the fund "would be produced" as both Courts below held then Petitioners have by the judgments herein recovered their share thereof.

No reason whatsoever exists, whatever action the Court may take on Mobil and Ohio's petitions, in our opinion to grant this petition for certiorari and we respectfully submit that it should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,

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